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 CH. Angelus II, LLC*

**E-filed on: June 12, 2014**

7 **UNITED STATES BANKRUPTCY COURT**

8 **DISTRICT OF NEVADA**

9  
 10 In re: )  
 11 WILLIAM A. GAYLER, ) Case No.: BK-S-09-31603-MKN  
 12 Debtor. ) Chapter 7  
 13 ) DATE: June 26, 2014  
 13 ) TIME: 11:00 AM

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14 **OPPOSITION TO FIRST AND FINAL APPLICATION FOR ALLOWANCE OF**  
 15 **ATTORNEYS' FEES (\$66,025.00) AND REIMBURSEMENT OF EXPENSES (\$8,587.19)**  
 16 **OF HOWARD KIM & ASSOCIATES, LLC AS CHAPTER 7 ADMINISTRATIVE**  
 16 **EXPENSES AND REQUEST FOR PAYMENT**

17 Managing Member of CH Angelus, II, LLC, Barry Moore; Equity Interest Holders of CH  
 18 Angelus, II, LLC, Barry R. Moore and Janie Moore as Co-Trustees of the BAMM Living Trust  
 19 Dated July 16, 2003, Groth, LLC, CH Pichon, LLC, and Harlan LLC through their managing  
 20 member John O'Brien (collectively, "Angelus II Members"), by and through their attorney of  
 21 record, the law firm of Larson & Zirzow, LLC, hereby submit their opposition (the "Opposition")  
 22 to the *First and Final Application for Allowance of Attorneys' Fees (\$66,025.00) and*  
 23 *Reimbursement of Expenses (\$8,587.19) of Howard Kim & Associates, LLC as Chapter 7*  
 24 *Administrative Expense and Request for Payment* (the "Fee Application") [ECF No. 687] filed by  
 25 Howard C. Kim, Esq. of Howard Kim & Associates, LLC (the "Kim Firm").

26 ...

27 ...

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1        This Opposition is made and based upon the pleadings and papers on file herein, the  
2 attached Memorandum of Points and Authorities, any Exhibits hereto, the papers and pleadings on  
3 file herein, the Declaration of John O'Brien filed in support the dismissal of the CH Angelus II,  
4 LLC bankruptcy case, Case No. BK-S-12-22209-MKN at ECF No. 16 (the "O'Brien Decl.") and  
5 the Declaration of Barry Moore filed in support the dismissal of the CH Angelus II, LLC  
6 bankruptcy case, Case No. BK-S-12-22209-MKN at ECF No. 15 ("Moore Decl."), and any oral  
7 argument permitted by this Honorable Court at the hearing.

8        Angelus II Members request that the Court take judicial notice of the papers and pleadings  
9 filed in this bankruptcy case pursuant to Federal Rule of Bankruptcy Procedure 9017 and Federal  
10 Rule of Evidence 201.

11       Given the extensive factual background of this case, Angelus II Members requested leave  
12 of Court to exceed the page limits set forth in LR 9014(e)(1). The Court granted this request on  
13 June 12, 2014. [ECF No. 724].

14       **MEMORANDUM OF POINTS AND AUTHORITIES**

15       **I. FACTUAL BACKGROUND**

16       **A. Gayler's Bankruptcy**

17       Debtor William A. Gayler is a real estate broker and an investment advisor and manager.  
18 *See* Moore Decl.; *see also* O'Brien Decl. Gayler carries the designation Certified Commercial  
19 Investment Manager ("CCIM"). *See id.*

20       On November 16, 2009, John D. O'Brien, The Pius Rieger FLP and Addison Glass, Inc.  
21 filed an Involuntary Bankruptcy Petition in accordance with Chapter 7 of the Bankruptcy Act  
22 against Gayler. *See* ECF No. 1. On December 17, 2009, an Order Granting Interim Relief was  
23 entered which enjoined Gayler from "transferring conveying, or concealing any real or personal  
24 property, in which he has an interest, directly or indirectly, with a value in excess of \$10,000.00  
25 without further order of this Court." The Order Granting Interim Relief further enjoined Gayler  
26 by and through any entity which he owns or controls, directly or indirectly including through  
27  
28

1 limited liability companies “from transferring any real or personal property with a value in excess  
2 of \$10,000.00 without further order of this Court, or the majority vote of the non-related members,  
3 shareholders or partners.” *See ECF No. 32*

4 On June 28, 2010, Gayler filed his Amended Voluntary Petition (the “Petition”). *See ECF*  
5 No. 105. In Schedule B of the Petition, Gayler listed ownership, membership, and/or partnership  
6 interests in over 60 different entities, including CH Angelus II, LLC, Groth, LLC, CH Pichon,  
7 LLC, and Harlan LLC. *See id.* In Schedule C of the Petition, Gayler claimed all of his stock,  
8 ownership, membership, and/or partnership interests set forth in Schedule B to be exempt under  
9 11 U.S.C. § 522(b)(3) and NRS 21.090(1)(z). *See id.* However, in an Order entered on January  
10 7, 2011, the Court granted an objection filed by City National Bank and thereby disallowed  
11 Gayler’s claimed exemptions for all partnership, stock, and membership interests identified in  
12 Schedule C to the Petition. *See ECF No. 164.*

13 On or about March 29, 2010, James F. Lisowski, Sr. (the “Lisowski”) was appointed the  
14 Chapter 7 Trustee. In an Order entered on May 23, 2011, the Court approved the Application to  
15 employ Marquis Aubach Coffing (“MAC”) as Special Counsel for Lisowski “for the purpose of  
16 investigating and proceeding with specific litigation issues regarding multiple potential fraudulent  
17 conveyance actions and/or preference actions.” *See ECF Nos. 192 and 205.*

18 On January 28, 2011, the Diamante Rose Adversary Complaint was filed in Gayler’s  
19 bankruptcy proceedings to obtain a nondischargeable judgment against Gayler under 11 U.S.C. §  
20 523(a)(2) and 11 U.S.C. § 523(a)(4) based on Gayler’s wrongful conduct as Managing Member of  
21 Diamante Rose, LLC (“Diamante Rose”). *See* Docket of Adversary Case No. 11-01027  
22 (“Diamante Rose Docket”) at ECF No. 1. On October 10, 2012, a nondischargeable Judgment in  
23 the amount of \$500,000 was awarded against Gayler under 11 U.S.C. § 523(a)(2)(A) for actual  
24 fraud. *See* Diamante Rose Docket at ECF No. 155. On March 5, 2013, another nondischargeable  
25 Judgment in the amount of \$120,828.05 was awarded against Gayler to the Diamante Rose  
26 plaintiffs for all reasonable attorney fees and costs. *See* Diamante Rose Docket at ECF No. 185.

27 Gayler’s conduct associated with the Diamante Rose matter resulted in a Criminal  
28 Indictment centered on Gayler’s fraudulent management of Diamante Rose filed by the Nevada

1 Attorney General. As indicted by a Grand Jury in Clark County, Nevada, the Attorney General  
 2 charged Gayler with seven counts of Theft; three counts of Securities Fraud; and two counts of  
 3 Securities Fraud Against a Person 60 Years of Age or Older.

4 On March 15, 2011, Barry Moore (“Moore”) commenced an adversary proceeding to  
 5 obtain a nondischargeable judgment against Gayler for actual fraud partly based on Gayler’s  
 6 mismanagement of Angelus I and Angelus II (the “Moore Adversary”). *See* Docket of Adversary  
 7 Case No. 11-01088 (“Moore Docket”) at ECF No. 1. The Moore Adversary Complaint contained  
 8 the identical allegations against Gayler as litigated in the 777 Case discussed below. *See id.*

9 Pursuant to a settlement reached on September 11, 2012 and approved by the Court, Gayler  
 10 confessed to a judgment under 11 U.S.C. 523(a)(2)(A) for actual fraud in favor of Moore in the  
 11 amount of \$750,000. *See* Moore Docket at ECF Nos. 45, 49, 56. Gayler specifically confessed  
 12 to fraud in relation to his conduct regarding the allegations against Gayler as litigated in the 777  
 13 Case. *See* Moore Docket at ECF No. 56.

14 On December 23, 2011, Lisowski commenced an Adversary Proceeding against Gayler for  
 15 numerous claims including, but not limited to, fraudulent transfers, alter ego claims, and seeking  
 16 to bring in various assets of the estate, including membership interests, to the extent they exist.  
 17 *See* Docket of Adversary Case No. 11-01410 (“Trustee Docket”) at ECF No. 1. The First  
 18 Amended Complaint was filed on May 10, 2012. *See* Trustee Docket at ECF No. 80.

19                   **B.        Gayler’s Lack of Authority for CH Angelus II, LLC, Groth,  
 20                   **LLC, CH Pichon, LLC, and Harlan LLC****

21 Gayler has fraudulently held himself out to still be the managing member of CH Angelus  
 22 II, LLC, Groth, LLC, CH Pichon, LLC, and Harlan LLC. *See* Moore Decl.; *see also* O’Brien Decl.  
 23 CH Angelus II, LLC (“Angelus II”) is owned by Barry Moore as Trustee of BAMM Living Trust  
 24 (“BAMM”) (8.5%), Groth, LLC (“Groth”) (26.8%), CH Pichon, LLC (“Pichon”) (30.73%),  
 25 Harlan, LLC (“Harlan”) (24.57%), TGF Holdings, LP (an entity owned and managed by Gayler)  
 26 (5.62%), and Walter Loerwald (3.78%). *See id.*

1                   1.       The 777 Case.

2                   On August 6, 2009, Angelus II Members, BAMM and other plaintiffs, including Mr.  
 3 O'Brien (collectively "777 Plaintiffs"), filed a complaint in the Eighth Judicial District Court in  
 4 Clark County, Nevada, Case No. A-09-596777-C ("777 Case") against Gayler and others, which  
 5 sought, among other things, to quiet title of the property owned by Angelus II in the name of the  
 6 respective LLC and to declare a \$2 million loan made by Defendants Eliot A. Alper, Trustee of  
 7 the Eliot A. Alper Revocable Trust Dated March 22, 1999 and Alper Limited Partnership  
 8 (hereinafter collectively "Alper") to Angelus II, and another entity, Ch. Angelus I, LLC ("Angelus  
 9 I"), by reason of Gayler's self-dealing and wrongful conduct. *See id.*

10                  On or about November 12, 2009 and prior to the filing of the Involuntary Petition, the  
 11 District Court bifurcated the 777 Case, compelling arbitration for the claims asserted against  
 12 Gayler, Barrett, Loerwald and others. The claims against Alper, however, proceeded to trial. It  
 13 had been determined by the 777 Plaintiffs that through Gayler's unauthorized conduct, Alper  
 14 loaned \$2 million to Angelus I and Angelus II on September 26, 2008, which was all due and  
 15 payable on September 26, 2009. *See id.* The 777 Plaintiffs in the 777 Case had no knowledge of  
 16 the \$2 million loan and did not consent to same. *See id.* The \$2 million loan was secured by 5  
 17 acres of real property owned by Angelus II and other property owned by Angelus I. When the \$2  
 18 million loan became due and payable on September 26, 2009, the loan was defaulted. *See id.*  
 19 Accordingly, Alper initiated foreclosure proceedings in December 2009 while the 777 Case was  
 20 pending. *See id.* A Notice of Breach and Election to Sell Under Deed of Trust was recorded on  
 21 Angelus I and Angelus II's property on January 5, 2010. *See id.* Three months later, a Notice of  
 22 Trustee's Sale was recorded on both parcels with the Trustee's Sale scheduled for April 28, 2010.  
 23 *See id.*

24                  On April 15, 2010, the 777 Plaintiffs moved in the 777 Case for the Court to issue a  
 25 preliminary injunction to enjoin Alper from foreclosing on Angelus I and Angelus II property. On  
 26 April 26, 2010, the Court entered its Order granting the preliminary injunction. *See id.*  
 27 Subsequently, a six-day bench trial occurred in front of the Honorable Judge Denton in the 777  
 28

1 State Court Case. *See id.* On March 15, 2011, Judge Denton entered Findings of Fact and  
2 Conclusions of Law in favor of the 777 Plaintiffs. *See id.* The Findings entered in favor of the  
3 777 Plaintiffs quieted title of the real property identified as property APN 176-10-101-012 in the  
4 name of Angelus II. The Findings further declared the Deeds of Trust in favor of Alper in the  
5 amount of \$2 million void and invalid based upon the self-dealing of Gayler, Barrett, and  
6 Loerwald. *See id.* After the entry of Findings of Fact and Conclusions of Law by the Court, on or  
7 about July 21, 2011, Alper appealed the decision to the Nevada Supreme Court. *See id.*

8 While the matter was before the Supreme Court, a settlement was reached between 777  
9 Plaintiffs and Alper in the 777 Case, wherein Alper agreed to pay \$1.4 million to Angelus I and  
10 Angelus II. *See id.* At the December 8, 2011 meeting, a majority of Angelus I and Angelus II  
11 members voted to accept \$1.3 million or more to settle the claim with Alper. *See id.* Based on the  
12 December 8, 2011 meeting, settlement negotiations resumed with Alper and a settlement was  
13 subsequently reached on December 14, 2011 wherein Alper was to pay Angelus I and Angelus II  
14 \$1.4 million in consideration for the Promissory Note dated September 25, 2008 secured by the  
15 Deed of Trust recorded on September 26, 2008 in the amount of \$2 million in favor of Alper being  
16 reinstated in relation to the Angelus I and Angelus II properties. *See id.*

17 By Order dated April 6, 2012 in the 777 Case, the District Court enforced and approved  
18 the settlement reached between the 777 Plaintiffs and Alper. *See id.* Within the April 6, 2012  
19 Order, the Court directed John Waroe as the appointed manager of Angelus I and Angelus II to  
20 execute any and all documents to finalize the settlement. *See id.* After the entry of the April 6,  
21 2012 Order, Mr. Waroe hesitated and later resigned as managing member of Angelus I and  
22 Angelus II. *See id.* On May 18, 2012, and pursuant to NRCP 70, the 777 Plaintiffs in the 777  
23 State Court Case requested the District Court to appoint John O'Brien, an Angelus I and Angelus  
24 II member, to act in place of John Waroe. *See id.* No opposition being filed, the Court granted  
25 the NRCP 70 motion authorizing and directing John O'Brien "to take all actions necessary on  
26 behalf of Angelus I and Angelus II to ensure that prompt action is taken to finalize the settlement  
27 reached with Alper." *See id.* The above Order was entered on June 11, 2012 and a copy of the  
28 Order was mailed to all Angelus I and Angelus II members. *See id.* Acting under the Court Order,

1 Mr. O'Brien executed the 777 settlement agreement instead of Mr. Waroe for the benefit of  
2 Angelus I and Angelus II. *See id.*

3       **2. Gayler's Manager Status in Angelus I and Angelus II is**  
4       **Revoked.**

5           On June 14, 2012, the Angelus I and Angelus II members held a meeting to discuss the  
6 disbursement of the \$1.4 Million settlement proceeds and the election of a new Managing Member  
7 for Angelus I, Angelus II, Groth, Pichon, and Harlan. *See id.* A majority of the members  
8 unanimously resolved that all legal expenses and delinquent property tax payments would first be  
9 paid and reimbursed out of the proceeds and the remaining balance would be divided 58% to  
10 Angelus I and 42% to Angelus II. *See id.* Recognizing the claims still pending in the 777 Case  
11 against Gayler, Barrett and Loerwald, a majority of the members further resolved that any interest  
12 claimed to be held by any of them would be held in trust until resolution or adjudication of the  
13 remainder of the 777 Case through arbitration or otherwise. *See id.*

14           At the June 14, 2012 Meeting, a majority of the Angelus I and Angelus II members  
15 removed Gayler as the Managing Member for cause and elected Barry Moore to serve in his stead.  
16 *See id.* Holding membership interests in Angelus II, a majority of the members of Groth, Pichon,  
17 and Harlan, removed Gayler as the Managing Member for cause and elected John O'Brien as the  
18 new Managing Member for Groth, Pichon, and Harlan. *See id.* Pursuant to Section 8.01(f) of the  
19 operating agreements of the LLCs, the non-managing members of each of the companies, Angelus  
20 I, Angelus II, Groth, Pichon, and Harlan, had the full authority to "remove a Managing Member  
21 or any successor Managing Member for cause." *See id.* Accordingly, it was confirmed at the June  
22 14, 2012 membership meeting that Gayler was removed as the managing member of Angelus I,  
23 Angelus II, Groth, Pichon and Harlan. *See id.*

24           After disbursement of the \$1.4 Million in settlement proceeds, \$413,322.25 remained in  
25 dispute representing the interests claimed by Gayler in Angelus I and Angelus II. In an Order  
26 dated October 12, 2012, the Court granted the request of the 777 Plaintiffs to allow the deposit of  
27 the \$413,322.25 into the Court's registry to protect the interests of the parties until the ownership  
28

1 of the membership interest claimed by Gayler in Angelus I and Angelus II is determined and/or  
2 resolved. The \$413,322.25 remains in the Court's registry and Gayler's membership interest in  
3 Angelus I and Angelus II remains disputed.

4 As the 777 Case was bifurcated to compel arbitration for the claims asserted against Gayler,  
5 Barrett, Loerwald and others, the 777 Plaintiffs sought relief from the automatic stay on November  
6 14, 2012 (the "777 Stay Relief Motion"). *See* ECF No. 466. The Court has taken the 777 Stay  
7 Relief Motion under advisement. As such, the 777 Plaintiffs have not proceeded with the  
8 arbitration against Gayler, Barrett and Loerwald.

9           **3.       The 997 Case.**

10           While the above issues were litigated on the merits and resolved relating to Angelus II's 5  
11 acres that Gayler encumbered without his investors' requisite authorization, Gayler moved forward  
12 with a second unauthorized and fraudulent scheme on the other unencumbered 1.25 acres owned  
13 by Angelus II. Gayler, after his manager status had been revoked and the members had appointed  
14 Barry Moore as manager, continued to act as if he were the manager of Angelus II and sold the  
15 1.25 acres and encumbered it with a \$200,000.00 Deed of Trust. As is Gayler's modus operandi,  
16 Gayler failed to advise any of the Angelus II non-managing members of his actions and perpetrated  
17 the scheme without consent and approval as required under the Angelus II Operating Agreement.  
18

19           On September 25, 2012, the 997 Case was filed. *See* Docket, *generally*, of Case No. A-  
20 668997 filed with the Eighth Judicial District Court, Clark County, Nevada (the "997 Case"). On  
21 October 19, 2012, Gayler was served with the Summons, Complaint and Notice of Lis Pendens in  
22 the 997 Case.

23           **C.       Gayler's Unauthorized Filing of the Angelus II Bankruptcy,  
24                   The Appointment of Rosenberg as Trustee, and the Kim  
25                   Firm's Employment as Counsel For Rosenberg in the Angelus  
26                   II Bankruptcy.**

27           One week after Gayler was served with the Summons and Complaint in the 997 Case,  
28 Gayler filed a Chapter 7 Voluntary Petition on behalf of Angelus II without the members'

1 knowledge or consent acting as if he was the manager of Angelus II despite his removal effective  
2 for months. *See Docket of Bankruptcy Case No. 12-22209 (“Angelus II Docket”)* at ECF No. 1.

3 Trustee Rosenberg was appointed as the trustee in the Angeles II Bankruptcy on October  
4 30, 2012. *See Angelus II Docket* at ECF No. 4. On November 6, 2011, the Court approved the  
5 employment of Howard Kim & Associates (the “Kim Firm”) as general counsel to Trustee  
6 Rosenberg in the Angelus II Bankruptcy. *See Angelus II Docket* at ECF No. 11.

7 Barry Moore, the Managing Member of Angelus II, and the Angelus II Members never  
8 authorized the bankruptcy filing of Angelus II. Barry Moore, the Managing Member of Angelus  
9 II, and the Angelus II Members moved to dismiss the bankruptcy filing due to the lack of Gayler’s  
10 corporate authority on December 18, 2012. *See Angelus II Docket* at ECF No. 14. The Motion to  
11 Dismiss was opposed by Gayler. The hearing on the Motion to Dismiss was held on January 23,  
12 2013 in front of this Court, almost three (3) months after the appointment of Trustee Rosenberg in  
13 the Angelus II matter. At the hearing, Trustee Rosenberg had yet to take a position on the Motion  
14 to Dismiss in the Angelus II matter because, despite being trustee for almost three (3) month in the  
15 Angelus II matter, he had not “had time to wrap his head around the case yet.” *See Angelus II*  
16 *Docket* at ECF No. 27, p. 7, l. 25 to p. 8, l. 3. The Kim Firm requested 60 days to come “up to  
17 speed” in the Angelus II matter. To date, the Motion to Dismiss in the Angelus II matter remains  
18 pending and, throughout his reign as Trustee, Rosenberg failed to take any position on the  
19 dismissal.

20       D.     **The Appointment of Rosenberg as Trustee in the Gayler**  
21                   **Bankruptcy, and the Kim Firm’s Employment as Counsel For**  
22                   **Rosenberg in the Gayler Bankruptcy.**

23       Lisowski resigned as trustee on or about December 11, 2012 in the Gayler bankruptcy.  
24 Trustee Rosenberg was appointed as the successor trustee in the Gayler Bankruptcy on December  
25 11, 2012, almost a month and a half after being appointed as trustee in the Angelus II bankruptcy.  
26 *See ECF No. 482.*

27       On February 19, 2013, Trustee Rosenberg sought to employ the Kim Firm as general  
28 counsel for Trustee Rosenberg in the Gayler bankruptcy. *See ECF No. 488* (the “Kim Firm

1       Employment Application"). The Kim Firm Employment Application made the following  
 2 statements:

3           9. The Trustee has selected the Kim Firm because it has  
 4 experience with administering Chapter 7 cases and is also general  
 5 counsel in a related case, CH Angeles II, LLC, BK-S-12-22209-  
 MKN [Dkt. No. 11 in that case], and, therefore, has institutional  
 6 knowledge of many related issues.

7           10. To its best knowledge and belief, the Kim Firm does not  
 8 have any material connection with any creditor, or any other party  
 9 in interest or their respective attorneys and accountants, in this  
 10 bankruptcy case.

11          11. To its best knowledge and belief, the Kim Firm has no  
 12 connection with the United States Trustee or any person employed  
 13 in the Office of the United States Trustee.

14          12. To its best knowledge and belief, the Kim Firm represents  
 15 no interest that is adverse to the Trustee, or to the Debtor's estate, in  
 16 matters upon which it will be engaged as counsel set forth in the  
 17 Kim Declaration.

18          See ECF No. 488. In support of the, Howard Kim filed a Declaration in which he states, in  
 19 pertinent part,

20           7. The Kim Firm represents the Trustee in other matters not  
 21 related to this case.

22           8. To my best knowledge and belief, the Kim Firm does not  
 23 represent the Debtor, creditors except as disclosed in the  
 24 Application, or any other party in interest or their respective  
 25 attorneys and accountants. The Kim Firm has examined the  
 26 statements and schedules for possible conflicts and found no  
 27 conflict.  
 28           ...

29           10. The Kim Firm may have represented or may continue to  
 30 represent various persons or entities listed on the statements and  
 31 schedules of Debtors in matters unrelated to this bankruptcy case.  
 32 The Kim Firm is not representing any such persons or entities in this  
 33 bankruptcy case.

34          11. To my best knowledge and belief, the Kim Firm represents  
 35 no interest that is adverse to the Trustee, or to the Debtor's estate, in  
 36 matters upon which it will be engaged as counsel as set forth in this  
 37 Declaration.

38          See ECF No. 489.

1        As such, besides asserting generally that the Kim Firm was also general counsel in the  
2 “related” Angelus II bankruptcy, there is no discussion in the Kim Firm Employment Application  
3 or the supporting declaration regarding the ongoing disputes between Gayler and Angelus II.  
4 There is no disclosure in either the Kim Firm Employment Application or in Kim’s supporting  
5 declaration as to the actual conflict in acting as counsel for Trustee Rosenberg in the estate of  
6 Angelus II, a corporate debtor, and in the estate of Gayler, a debtor who is an insider or officer,  
7 albeit disputed, of the corporate debtor, Angelus II. *See ECF Nos. 488 and 489.* It is indisputable  
8 that an actual conflict existed in representing both the Gayler and the Angelus II estates particularly  
9 given the ongoing disputes between the Angelus II Members and Gayler which were known as of  
10 the filing of the Kim Firm Employment Application on February 19, 2013 since the Kim Firm had  
11 already made an appearance at the hearing on the Motion to Dismiss the Angelus II bankruptcy on  
12 January 23, 2013 in which the facts regarding the conflict between the Gayler and the Angelus II  
13 estates were very clearly laid out. However, none of these ongoing issues are disclosed or pointed  
14 out in the Kim Firm Employment Application.

15       On or about March 15, 2013, the Court preliminarily approved the employment of the Kim  
16 Firm as general counsel to Trustee Rosenberg in the Gayler bankruptcy. *See ECF No. 500.* Upon  
17 the preliminary approval of the Kim Firm as general counsel to Trustee Rosenberg in the Gayler  
18 bankruptcy, no supplemental disclosures to the employment application in the Angelus II  
19 bankruptcy were ever made by either Trustee Rosenberg or by the Kim Firm. Furthermore, no  
20 supplemental disclosures were ever made in the Gayler bankruptcy. In fact, even when Trustee  
21 Rosenberg, by and through the Kim Firm, began negotiating a Settlement Agreement with Gayler,  
22 Gayler’s attorney (Sylvester), Barrett and Loerwald in which the two estates, Gayler and Angelus  
23 II, were on opposing sides of the Settlement Agreement neither Trustee Rosenberg nor the Kim  
24 Firm disclosed the conflict and instead promoted moving forward the Settlement Agreement in the  
25 Gayler bankruptcy to the detriment of the Angelus II Members and the Angelus II estate.

26       On April 11, 2013, MAC requested the Court to allow MAC to withdraw as Special  
27 Counsel. *See ECF No. 507.* No objections to MAC’s withdrawal were filed. In an Order entered  
28 on June 10, 2013, the Court granted MAC’s request. *See ECF No. 513.*

1                   **E. The Motion to Approve Settlement**

2                   Upon information and belief, the Kim Firm and Trustee Rosenberg entered into settlement  
 3 negotiations with Gayler, Gayler's attorney (Sylvester), Barrett and Loerwald sometime in April  
 4 of 2013. Trustee Rosenberg and the Kim Firm never once included any of the Angelus II Members  
 5 in the settlement discussions.

6                   On July 3, 2013, Trustee Rosenberg through the Kim Firm filed an Amended Motion to  
 7 Approve Settlement in this matter ("Settlement Motion") requesting the Court to approve a  
 8 Settlement Agreement between Trustee Rosenberg and Gayler, Sylvester, Loerwald, Barrett, and,  
 9 through Gayler's alleged authority, over 120 different entities. *See* ECF No. 516. The Settlement  
 10 Agreement was signed by Gayler, individually and on behalf of 120 entities, including CH Angelus  
 11 II, LLC, Groth, LLC, CH Pichon, LLC, and Harlan LLC. *See id.*

12                  With full knowledge that Gayler's alleged status as Managing Member of Angelus II,  
 13 Groth, Pichon, and Harlan and that Gayler's membership interests in Angelus II, Groth, Pichon,  
 14 and Harlan was disputed in the Angelus II bankruptcy since the filing of the Motion to Dismiss on  
 15 December 18, 2012, Trustee Rosenberg allowed Gayler to sign on the Settlement Agreement  
 16 behalf of CH Angelus II, LLC, Groth, LLC, CH Pichon, LLC, and Harlan LLC as  
 17 "Manager/Member." *See* ECF No. 516; *see also* Angelus II Docket at ECF No. 14.

18                  At the July 10, 2013 status hearing on the Angelus II Motion to Dismiss, Trustee  
 19 Rosenberg, through Kim, represented to the Court that "[i]t doesn't really matter to us whether or  
 20 not Mr. Gayler had or did not have authority to file a bankruptcy case from this trustee's  
 21 perspective." *See* Angelus II Docket at ECF No. 27, p. 4, l. 7-9. This highlights Trustee  
 22 Rosenberg's complete disregard for the need for corporate authority to bind an entity to either a  
 23 bankruptcy filing and highlights that neither Trustee Rosenberg nor the Kim Firm were acting in  
 24 the best interests of the estate of Angelus II.

25                  As part of the Settlement Agreement, Gayler agreed that all of his remaining assets, except  
 26 those listed in Exhibit 1 of the Agreement, "shall be" part of the Gayler bankruptcy estate. *See*  
 27 Settlement Motion. This specifically included his disputed membership interests and any  
 28 distributions from the 69 entities listed in Schedule B, including Angelus II, and "certain cash

1 assets" identified as distributions from Dominus, LLC and Distributions due to Gayler currently  
2 in the possession of Nevada Title Company and held due to the alleged fraudulent transfer claims  
3 associated with the transfer of assets from Sunset IV. Gayler further agreed to resign as managing  
4 member of all of his entities save those identified in Exhibit 1. *See id.*

5 Of particular concern was the fact that the Settlement Agreement makes over 120 different  
6 entities, including Angelus II, Groth, Pichon, and Harlan, parties to the Settlement Agreement and  
7 bound by its terms based solely upon the execution of the Settlement Agreement by Gayler, who  
8 is no longer the manager of Angelus II, Groth, Pichon, and Harlan and whose member interests  
9 remain in contention. *See* Settlement Agreement attached to ECF No. 516-1 at p. 7, ¶ 21 (stating  
10 that "[t]his agreement shall be binding upon the Trustee, Gayler, and the Gayler Entities" which  
11 include all 124 entities named as parties, including Angelus II, Groth, Pichon, and Harlan).

12 As support for the Settlement Agreement, Trustee Rosenberg, through the Kim Firm,  
13 represented to this Court that they still possesses no knowledge of these matters and "it would take  
14 time and money for my new counsel to come up to speed with the complexities of this case." *See*  
15 Settlement Motion, ECF No. 517, ¶ 13. Trustee Rosenberg indicated that if the Settlement Motion  
16 was approved that all of Gayler's interests in the Gayler entities will be made part of the Gayler  
17 bankruptcy estate, including Gayler's interest in Angelus II, Groth, Pichon, and Harlan. Trustee  
18 Rosenberg, through the Kim Firm, took no position in the Angelus II bankruptcy regarding the  
19 Motion to Dismiss. The factual basis for the Motion to Dismiss is the fact that Gayler is no longer  
20 the managing member of Angelus II, Groth, Pichon, and Harlan and that Gayler's interests in that  
21 entity were held in trust pending the outcome of the Angelus II 777 State Court Case or the Angelus  
22 II 997 State Court Case.

23 Trustee Rosenberg, through the Kim Firm, did nothing to discover or litigate the merits of  
24 the pending Adversary Proceedings against Gayler or the Dismissal Motion in the Angelus II  
25 bankruptcy. Trustee Rosenberg and the Kim Firm focused their energy on stalling the pending  
26 Motion to Dismiss in the Angelus II bankruptcy, entering into settlement negotiations with Gayler  
27 in the Gayler bankruptcy, and moving to disqualify MAC in order to push through the corrupt  
28 Settlement in the Gayler bankruptcy.

1                   **F.     The Opposition to the Settlement and the Subsequent**  
 2                   **Withdrawal of Trustee Rosenberg and the Kim Firm.**

3                  The Settlement Motion was vigorously opposed by the Angelus II Members and by other  
 4 parties in interest. *See* ECF Nos. 639, 643, 645, and 646. Of critical note, on April 11, 2014, the  
 5 United States Trustee for Region 17 filed an Objection to Proposed Settlement (the “US Trustee’s  
 6 Objection”). *See* ECF No. 646. The US Trustee’s Objection points out that the Settlement  
 7 Agreement is unfair and fails to comply with the factors discussed in *In re A&C Properties*, 784  
 8 F.2d 1377 (9<sup>th</sup> Cir. 1986), *cert. denied*, 479 U.S. 854 (1986). *See* ECF No. 646 at p. 2-3. In  
 9 opposition to the Settlement Agreement, the US Trustee’s Objection points out that a conflict of  
 10 interest exists in the representation of both the Angelus II estate and the Gayler estate by Trustee  
 11 Rosenberg, by and through the Kim Firm. *See* ECF No. 646 at p. 3. Specifically, the US Trustee’s  
 12 Objection states the following:

13                  A conflict of interest nullifies the protection afforded by the business  
 14 judgment rule. *See, e.g.* *In re Tama Beef Packing, Inc.*, 290 B.R. 90,  
 15 97 (B.A.P. 8th Cir. 2003); *see also* *In re CNC Payroll, Inc.*, 491 B.R.  
 16 454, 461-62 (Bankr. S.D. Tex. 2013); *see also* *Joy v. North*, 692 F.2d  
 17 880, 886 (2d Cir. 1982). Trustee Rosenberg is not only the Chapter  
 18 7 trustee of this case, he is also the Chapter 7 trustee of the estate in  
 19 *In re CH Angelus II, LLC*, Case No. 12-22209-MKN (Bankr. D.  
 20 Nev. filed Oct. 30, 2012)(“CH Angelus II Case”). [See CH Angelus  
 21 II Case, Docket No. 4.] Debtor discloses, *inter alia*, in his schedules  
 22 both a claim for accounts receivables against CH Angelus II and an  
 23 unsecured claim by CH Angelus II against Debtor. [See Docket No.  
 24 105, pp. 21 & 37 of 85.] The settlement agreement purports to be  
 25 an agreement between, among others, both of these entities—  
 26 William A. Gayler and CH Angelus II, LLC. [See Docket No. 516-  
 27 1, p. 2 of 20.] Trustee Rosenberg is trustee of both estates and  
 28 therefore stands on both sides of the proposed settlement. As a  
 result, the business judgment rule cannot apply.

See ECF No. 646 at p. 3-4.

According to the Fee Application, on April 15, 2014, in light of the US Trustee’s affirmative assertion of an actual conflict of interest due to the dual representation of both the Angelus II estate and the Gayler estate by Trustee Rosenberg in the proposed settlement, by and through the Kim Firm, the Trustee Rosenberg sent the US Trustee his resignations in both the

Angelus II bankruptcy and the Gayler bankruptcy with the request that the US Trustee accept his resignations and immediately assign both cases to other trustees. *See ECF No. 687 at p. 12; see also ECF No. 648 at p. 24-28 (“Trustee Rosenberg’s Resignations”).* Trustee Rosenberg’s Resignations specifically state that:

Trustee [Rosenberg] has a duty to resign under the facts that now exist, as clearly indicated on Page 2-6 of the Handbook for Chapter 7 Trustees:

“If a trustee discovers a conflict of interest or a lack of disinterestedness after accepting the appointment, the trustee shall immediately resign from the case. Conflict waivers by either the debtor or creditor do not obviate the trustee’s duty to resign.”

*See ECF No. 648 at p. 24-28 (wherein Trustee Rosenberg acknowledges his duty to resign from the two cases due to the conflict of interest). According to the Fee Application, on April 16, 2014, the UST accepted the Trustee Rosenberg’s Resignations and informed Trustee Rosenberg that successor appointments would be made. See ECF No. 687 at p. 12. On April 17, 2014, Victoria Nelson was appointed as the new trustee for the Gayler case. See ECF No. 653.*

On April 16, 2014, the Kim Firm filed its Motion to Withdraw as Counsel for the Trustee Rosenberg on an order shortening time (“Kim Motion to Withdraw”) in light of the US Trustee’s assertion of a conflict of interest. *See ECF No. 648.* The Kim Firm acknowledges in the Motion to Withdraw that a “potential conflict has arisen regarding [the Kim Firm’s] dual representation” and that the US Trustee has affirmatively asserted that an actual conflict of interest exists in the Trustee’s dual representation of both estates. *See id.* at p. 5-6. The Kim Firm acknowledges that, “as counsel for the Trustee [Rosenberg] in both cases, this conflict would naturally extend to [the Kim Firm] as well as the Trustee [Rosenberg].” *See id.* at p. 6.

The Angelus II Members filed a Limited Opposition to the Kim Motion to Withdraw expressly requesting the Court’s reservation of jurisdiction to impose sanctions or to review compensation sought in connection with the dual representation by Trustee Rosenberg and the Kim Firm and reserving and rights and remedies that the Angelus II Members and the Angelus II estate may have as a result of the conduct of Trustee Rosenberg or the Kim Firm. *See ECF No. 658.*

The Court granted the Kim Motion to Withdraw on April 25, 2014 subject to the reservations set forth in the Limited Opposition to the Kim Motion to Withdraw. *See ECF No. 668.*

On June 3, 2014, the successor trustee withdrew the Settlement Motion. *See ECF No. 716.*

#### **G. The Kim Firm Fee Application.**

The Kim Firm seeks a total of \$74,612.19 in attorney fees and costs from the Gayler estate, representing \$66,025.00 in attorney fees and \$8,587.19 in costs. *See ECF No. 687.* The entirety of the fees and costs sought were incurred well after the Kim Firm had already been employed in the Angelus II bankruptcy. *See ECF No. 687.* All of the fees and costs for which compensation is sought by the Kim Firm were incurred after the actual conflict in acting as counsel for Trustee Rosenberg in the estate of Angelus II, a corporate debtor, and in the estate of Gayler, a debtor who is an insider or officer, albeit disputed, of the corporate debtor, Angelus II. *See ECF No. 687; see also* The Handbook for Chapter 7 Trustees, the United States Trustee Program, Department of Justice, effective October 1, 2012 (setting forth that this specific example of dual representation constitutes a conflict of interest).

### **II. LEGAL ARGUMENT**

#### **A. Applicable Law.**

Attorneys for the bankruptcy estate are held to a high standard. Professionals hired by the trustee represent the estate and not the debtor. *See In re Smith*, 507 F.3d 64, 71-72 (2nd Cir. 2007). Under Section 327(a), professionals may not “hold or represent *an interest adverse to the estate*,” and under Section 327(c), although they are not disqualified “solely” because of employment by or representation of a creditor, the bankruptcy court “shall” disapprove their employment upon objection if there is an “*actual conflict of interest*.” 11 U.S.C. § 327(a) and (c) (emphasis added).

<sup>1</sup>

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<sup>1</sup> Section 327(a) and (c) state, in full:

(a) Except as otherwise provided in this section, the trustee, with the court’s approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee’s duties under this title.

1           In differentiating subsections (a) and (c) of Section 327, the courts sometimes distinguish  
 2 so-called “potential” conflicts from the “actual conflicts” mentioned in the statute:

3           Section 327(a), as well as § 327(c), imposes a *per se disqualification*  
 4 as trustee’s counsel of any attorney who has an *actual* conflict of  
 5 interest [whereas] the [bankruptcy] court may within its  
*discretion*—pursuant to § 327(a) and consistent with § 327(c)—  
 disqualify an attorney who has a *potential* conflict of interest....

6           *Dye v. Brown (In re AFI Holding, Inc.)*, 355 B.R. 139, 154 (9th Cir. BAP 2006) (quoting *In re*  
 7 *Marvel Entm’t Group*, 140 F.3d 463, 476 (3rd Cir. 1998)) (emphasis added).

8           Section 327(a) also requires the professional to be a “disinterested person,” defined in  
 9 Section 101(14) to mean a person who, among other things, “does not have an interest *materially*  
 10 *adverse* to the interest of the estate or of any class of creditors or equity security holders, by reason  
 11 of any direct or indirect relationship to, connection with, or interest in, the debtor . . . or for any  
 12 other reason[.]” 11 U.S.C. § 101(14)(E)(emphasis added).

13           The terms “materially adverse” (Section 101(14)(E)) and “interest adverse to the estate”  
 14 (Section 327(a)) are not defined, but

15           A generally accepted definition of “adverse interest” is the (1)  
 16 possession or assertion of an economic interest that would tend to  
 17 lessen the value of the bankruptcy estate; or (2) possession or  
 18 assertion of an economic interest that would create either an actual  
 19 or potential dispute in which the estate is a rival claimant; or (3)  
 20 possession of a predisposition under circumstances that creates a  
 21 bias against the estate.

22  
 23  
 24           

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 25           \* \* \*  
 26           (c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for  
 27 employment under this section solely because of such person’s employment by or  
 28 representation of a creditor, unless there is objection by another creditor or the  
 United States trustee, in which case the court shall disapprove such employment  
 if there is an actual conflict of interest.  
 11 U.S.C. § 327(a) and (c).

1 required by the [Bankruptcy] Code") (citations omitted); *see also Tevis v. Wilke, Fleury et al. (In  
2 re Tevis)*, 347 B.R. 679, 688 (9th Cir. BAP 2006) (similar definition).

3 Section 327(a) prohibits the employment of professionals who hold or represent an interest  
4 adverse to the estate and who are not disinterested. *Mehdipour*, 202 B.R. at 480. The bankruptcy  
5 court does not have authority to allow the employment of a professional in violation of § 327, and  
6 the employment is void *ab initio* if it is determined that the professional holds or represents an  
7 interest adverse to the estate or is not disinterested. *See id.*; *see also First Interstate Bank of Nev.,*  
8 *N.A. v. CIC Inv. Corp. (In re CIC Inv. Corp.)*, 175 B.R. 52, 56 (9th Cir. BAP 1994); *In re EWC,*  
9 *Inc.*, 138 B.R. 276, 281 (Bankr. W.D. Okla. 1992). Approval granted under Section 327 is  
10 preliminary and subject to final review by the court pursuant to Section 330. The ultimate decision  
11 as to whether there is a disqualifying conflict or adverse interest lies within the discretion of the  
12 court. *In re B.E.S. Concrete Prods., Inc.*, 93 B.R. 228, 236 (Bankr. E.D. Cal. 1988).

13 Any professional who the court determines to hold or represent an interest adverse to the  
14 estate or who is not disinterested is not an officer of the estate during the time of conflict and must  
15 be denied compensation for services performed during the conflict pursuant to § 330. *Mehdipour*,  
16 202 B.R. at 480 (*citing EWC*, 138 B.R. at 281.). Section 330(a) provides, in part, that the  
17 bankruptcy court "may award to ... a professional person employed under section 327 or 1103—  
18 (A) reasonable compensation for actual, necessary services ... and (B) reimbursement for actual,  
19 necessary expenses." 11 U.S.C. § 330(a)(1).

20 The Handbook for Chapter 7 Trustees published by the United States Trustee Program,  
21 Department of Justice, sets forth specific instances in which an actual conflict of interest exists.  
22 *See The Handbook for Chapter 7 Trustees*, the United States Trustee Program, Department of  
23 Justice, effective October 1, 2012. The Handbook for Chapter 7 Trustees provides as follows:

24 **K. TRUSTEE PROFESSIONALISM AND ETHICS**

25 **1) CONFLICTS OF INTEREST**

26 A trustee must be knowledgeable of sections 701(a)(1), 101(14), and  
27 101(31), as well as any other applicable law or rules, and must  
28 decline any appointment in which the trustee has a conflict of  
interest or lacks disinterestedness. The trustee must have in place a

1 procedure to screen new cases for possible conflicts of interest or  
2 lack of disinterestedness upon being appointed. 28 U.S.C. § 586.

3 If a trustee discovers a conflict of interest or a lack of  
4 disinterestedness after accepting the appointment, the trustee shall  
5 immediately resign from the case. Conflict waivers by either the  
6 debtor or creditor do not obviate the trustee's duty to resign.  
7

8 The trustee must advise the United States Trustee upon the  
9 discovery of any potential conflict or lack of disinterestedness so  
10 that a determination can be made as to whether the appointment of  
11 a successor trustee is necessary. In addition, the trustee must  
12 disclose any potential conflicts on the court record or at the meeting  
13 of creditors, or both. The trustee also must advise the United States  
14 Trustee upon discovery of any circumstances which might give rise  
15 to the appearance of impropriety. 28 U.S.C. § 586.

16 While it is not possible to list all situations presenting an actual or  
17 potential conflict of interest or lack of disinterestedness, a non-  
18 exclusive list of examples follows:

- 19 a. The trustee represents or has represented the debtor, a  
20 creditor, an equity security holder, or an insider in other  
21 matters;
- 22 b. The debtor or creditor is an employee of the trustee or of a  
23 professional providing services to the trustee in the case;
- 24 c. *The trustee is appointed to serve as trustee for a corporate  
25 debtor and for a debtor who is an insider, officer, director  
or guarantor of the corporate debtor;*
- 26 d. The estate has a potential cause of action against the trustee,  
27 an employee of the trustee, a client of the trustee or the  
28 trustee's firm or other person or entity with whom the trustee  
has a business or family relationship;
- 29 e. The trustee was an officer, director, or employee of the  
30 debtor within two years before the commencement of the  
31 case; or
- 32 f. The trustee is a creditor or an equity security holder of the  
33 debtor.

34 Several courts have addressed the issue of whether an actual or  
35 potential conflict of interest or lack of disinterestedness of a trustee's  
36 partner or associate may be imputed to the trustee. Therefore, the  
37 trustee needs to disclose to the United States Trustee all situations  
38 presenting an actual or potential conflict of interest or lack of  
39 disinterestedness for the trustee's partners or law firm.

40 Fed. R. Bankr. P. 2009 allows the appointment of one trustee in  
41 jointly administered cases. The trustee should be aware of the  
42 existence of inter-debtor claims and must monitor them because  
43 conflicts can develop and require the appointment of separate  
44 trustees.

1       See *id.* (emphasis added).

2                  The statutory provisions of Sections 327 and 330 work in tandem with Fed. R. Bankr. P.  
3 2014, which states that a professional's application for employment "shall be accompanied by a  
4 verified statement of the person to be employed setting forth the person's connections with the  
5 debtor, creditors, any other party in interest, their respective attorneys and accountants, the [US  
6 Trustee], or any person employed in the office of the [US Trustee ]." Fed. R. Bankr. P. 2014. This  
7 has been interpreted to impose an ongoing duty of disclosure. *In re West Delta Oil Co., Inc.*, 432  
8 F.3d 347, 355 (5th Cir. 2005). The penalty for nondisclosure is within the bankruptcy court's  
9 discretion, and can range from nothing (*CIC Inv. Corp.*, 175 B.R. at 54) to disallowance of all fees.  
10 *Neben & Starrett, Inc. v. Chartwell Fin. Corp. (In re Park–Helena Corp.)*, 63 F.3d 877, 882 (9th  
11 Cir. 1995).

12                  A professional's nondisclosure would warrant sanctions even if it is not otherwise  
13 disqualified from employment or compensation. *Kravit, Gass & Weber, S.C. v. Michel (In re  
14 Crivello)*, 134 F.3d 831, 836 (7th Cir. 1998) ("Though [Rule 2014] allows the fox to guard the  
15 proverbial hen house, counsel who fail to disclose timely and completely their connections proceed  
16 at their own risk because failure to disclose is sufficient grounds to revoke an employment order  
17 and deny compensation.").

18                  Pursuant to § 327, a professional has a duty to make full, candid and complete disclosure  
19 of all facts concerning his transactions with the debtor creditors, any other party in interest, their  
20 respective attorneys and accountants, the US Trustee, or any person employed in the office of the  
21 US Trustee. *See Park–Helena*, 63 F.3d at 881; *In re Plaza Hotel Corp.*, 111 B.R. 882, 883 (Bankr.  
22 E.D. Cal.), *aff'd*, 123 B.R. 466 (9th Cir. BAP 1990). Professionals must disclose all connections  
23 with the debtor, creditors and parties in interest, no matter how irrelevant or trivial those  
24 connections may seem. *In re EWC*, 138 B.R. at 280. The disclosure rules are not discretionary.  
25 *Id.* The duty to disclose is not vitiated by negligent or inadvertent omissions. *Park–Helena*, 63  
26 F.3d at 881. A court may sanction a professional for disclosure violations regardless of actual  
27 harm to the estate. *In re Film Ventures Intern., Inc.*, 75 B.R. 250, 253 (9th Cir. B.A.P. 1987); *In  
28 re EWC*, 138 B.R. at 280.

1                   **B.        The Employment of the Kim Firm Violates Section 327, is Void**  
 2                   **Ab Initio, and Compensation Must Be Denied.**

3                   The Kim Firm seeks a total of \$74,612.19 in attorney fees and costs from the Gayler estate,  
 4                   representing \$66,025.00 in attorney fees and \$8,587.19 in costs. *See* ECF No. 687. The entirety  
 5                   of the fees and costs sought were incurred well after the Kim Firm had already been employed in  
 6                   the Angelus II bankruptcy. *See* ECF No. 687.

7                   All of the fees and costs for which compensation is sought by the Kim Firm were incurred  
 8                   after the actual conflict in acting as counsel for Trustee Rosenberg in the estate of Angelus II, a  
 9                   corporate debtor, and in the estate of Gayler, a debtor who is an insider or officer, albeit disputed,  
 10                  of the corporate debtor, Angelus II. *See* ECF No. 687; *see also* The Handbook for Chapter 7  
 11                  Trustees, the United States Trustee Program, Department of Justice, effective October 1, 2012.  
 12                  This situation, wherein a trustee is appointed in the estate of a corporate debtor and in the estate of  
 13                  a debtor who is an insider or officer of the corporate debtor is specifically set forth as a specific  
 14                  example of a dual representation constitutes a conflict of interest in the Handbook for Chapter 7  
 15                  Trustees. *See id.* As such, the actual conflict in representing the Trustee in these two matters  
 16                  should have been immediately apparent to Trustee Rosenberg and to the Kim Firm.

17                  Furthermore, the extensive conflicts between the Gayler estate and the Angelus II estate,  
 18                  inclusive of the conflicts between Gayler and the Angelus II Members, were specifically pointed  
 19                  out to the Court and to Trustee Rosenberg and the Kim Firm very early in their involvement in the  
 20                  Angelus II and the Gayler matters. Specifically, the Angelus II Members moved to dismiss the  
 21                  Angelus II bankruptcy filing due to Gayler's lack of corporate authority on December 18, 2012.  
 22                  *See* Angelus II Docket at ECF No. 14. The Motion to Dismiss filed in the Angelus II bankruptcy  
 23                  specifically detailed the numerous conflicts between Gayler and the Angelus II estate. Trustee  
 24                  Rosenberg was appointed in the Angelus II matter prior to the filing of the Motion to Dismiss.  
 25                  Furthermore, Trustee Rosenberg, through the Kim Firm, appeared at the hearing on the Motion to  
 26                  Dismiss on January 23, 2013. Both Trustee Rosenberg and the Kim Firm were well aware, very  
 27                  early in the handling of the Angelus II matter that (i) they were acting in dual roles for both a  
 28

1 corporate debtor and for the corporate debtor's alleged insider/officer and that (ii) an actual conflict  
2 existed between Angelus II and Gayler.

3       Nonetheless, Trustee Rosenberg did not resign from the Gayler bankruptcy and filed an  
4 application to seek employment of the Kim Firm in the Gayler bankruptcy while continuing as  
5 trustee in the Angelus II bankruptcy, with the Kim Firm as general counsel in the Angelus II  
6 bankruptcy. As noted herein, besides asserting generally that the Kim Firm was also general  
7 counsel in the "related" Angelus II bankruptcy, there is no discussion or even minimal disclosure  
8 in the Kim Firm Employment Application or the supporting declaration regarding the ongoing  
9 disputes between Gayler and Angelus II even though those ongoing disputes had been briefed and  
10 made known to Trustee Rosenberg and the Kim Firm almost two months prior to the filing of the  
11 Kim Firm Employment Application in the Angelus II Motion to Dismiss.

12       Furthermore, there is no disclosure in either the Kim Firm Employment Application or in  
13 Kim's supporting declaration as to the actual conflict in acting as counsel for Trustee Rosenberg  
14 in the estate of Angelus II, a corporate debtor, and in the estate of Gayler, a debtor who is an insider  
15 or officer, albeit disputed, of the corporate debtor, Angelus II. *See* ECF Nos. 488 and 489. Rather,  
16 the Kim Firm Employment Application merely references that the Kim Firm is also general  
17 counsel in a "related" matter, the Angelus II bankruptcy. There is no explanation in the Kim Firm  
18 Employment Application as to how Gayler and Angelus II are related or as to the issues in the  
19 Angelus II matter and Gayler's self-dealing and fraudulent conduct against the Angelus II estate.

20       In fact, even when Trustee Rosenberg, by and through the Kim Firm, began negotiating a  
21 Settlement Agreement with Gayler, Gayler's attorney (Sylvester), Barrett and Loerwald in which  
22 the two estates, Gayler and Angelus II, were on opposing sides of the Settlement Agreement  
23 neither Trustee Rosenberg nor the Kim Firm disclosed the conflict and instead promoted moving  
24 forward the Settlement Agreement in the Gayler bankruptcy to the detriment of the Angelus II  
25 Members and the Angeles II estate. When the dual representation was discovered by the US  
26 Trustee, the US Trustee filed an Objection to the Settlement Agreement triggering the immediate  
27 resignation of Trustee Rosenberg and the withdrawal of the Kim Firm. However, there is no basis  
28 for arguing that the conflict did not exist prior to the filing of the US Trustee's Objection.

1           It is indisputable that an actual conflict existed in representing both the Gayler and the  
2 Angelus II estates from the very beginning. None of these ongoing issues were disclosed or  
3 pointed out in the Kim Firm Employment Application. Section 327(a), as well as § 327(c),  
4 imposes a *per se disqualification* as trustee's counsel of any attorney who has an *actual* conflict  
5 of interest [whereas] the [bankruptcy] court may within its *discretion*—pursuant to § 327(a) and  
6 consistent with § 327(c)—disqualify an attorney who has a *potential* conflict of interest

7           The law is very clear that the bankruptcy court does not have authority to allow the  
8 employment of a professional in violation of § 327, and the employment is void *ab initio* if it is  
9 determined that the professional holds or represents an interest adverse to the estate or is not  
10 disinterested. *See id.*; *see also First Interstate Bank of Nev., N.A. v. CIC Inv. Corp. (In re CIC Inv.*  
11 *Corp.)*, 175 B.R. 52, 56 (9th Cir. BAP 1994); *In re EWC, Inc.*, 138 B.R. 276, 281 (Bankr. W.D.  
12 Okla. 1992). Any professional who the court determines to hold or represent an interest adverse  
13 to the estate or who is not disinterested is not an officer of the estate during the time of conflict  
14 and **must** be denied compensation for services performed during the conflict pursuant to § 330.  
15 *Mehdipour*, 202 B.R. at 480 (*citing EWC*, 138 B.R. at 281.).

16           An actual conflict existed in representing both the Gayler and the Angelus II estates from  
17 the very beginning. As such, the Kim Firm was *per se* disqualified as counsel for the trustee in  
18 the Gayler matter from the beginning of its employment as the Kim Firm had already previously  
19 been employed as counsel for the trustee in the Angelus II matter. This actual conflict of interest  
20 imposes a mandatory requirement upon this Court find the employment of the Kim Firm to be in  
21 violation of § 327. The employment of the Kim Firm was void *ab initio* as the Kim Firm held an  
22 interest adverse to the Gayler estate and the Angelus II estate when the Kim Firm engaged in the  
23 dual representation of the two estate. The Kim Firm must be denied compensation for services  
24 performed during the conflict pursuant to § 330. *Mehdipour*, 202 B.R. at 480 (*citing EWC*, 138  
25 B.R. at 281.).

1           **III. CONCLUSION**  
2

3           Based upon the foregoing, the Debtor requests that this Court deny the Fee Application in  
4           its entirety.  
5

6           Dated: June 12, 2014.  
7

8           LARSON & ZIRZOW, LLC  
9

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